

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

|                              |   |                       |
|------------------------------|---|-----------------------|
| IN RE:                       | ) | In Proceedings        |
|                              | ) | Under Chapter 11      |
| RONALD DEAN FISHER,          | ) |                       |
|                              | ) | No. BK 85-30784       |
| Debtor(s),                   | ) |                       |
|                              | ) |                       |
| KINGSLEY & FISHER PRODUCTS,  | ) | No. BK 85-30785       |
| INC.,                        | ) |                       |
|                              | ) |                       |
| Debtor(s),                   | ) |                       |
|                              | ) |                       |
| KINGSLEY & FISHER PRODUCTS,  | ) |                       |
| INC. and RONALD DEAN FISHER, | ) |                       |
|                              | ) |                       |
| Plaintiffs,                  | ) |                       |
| v.                           | ) | ADVERSARY NO. 90-0066 |
|                              | ) | ADVERSARY NO. 90-0065 |
| BERTIS N. KINGSLEY,          | ) |                       |
|                              | ) |                       |
| Defendant.                   | ) |                       |

MEMORANDUM & ORDER

Ronald D. Fisher and Bertis Kingsley were the sole share-holders of Kingsley and Fisher Products, Inc., an Illinois corporation formed in February 1983. On or about June 8, 1984, the parties entered into a Stock Purchase Agreement, which provided that should Kingsley decide to no longer work for the company, he would transfer his fifty shares of common stock to Kingsley & Fisher Products, Inc., thus leaving Fisher as the sole owner of issued and outstanding stock in the company. The agreement further provided that as consideration for the transfer of his stock, Kingsley would receive one percent of the adjusted gross retail sales of the company and would be maintained on the company's group health and life insurance plans. The agreement additionally provided that Fisher would personally guarantee the obligations

owed by the company to Kingsley. In September 1985, Kingsley transferred his shares of common stock to the company pursuant to the terms of the Stock Purchase Agreement.

On October 24, 1985, Kingsley & Fisher Products, Inc. filed a Chapter 11 bankruptcy petition. Ronald Fisher filed a separate, individual Chapter 11 bankruptcy petition on the same date. Kingsley was listed as a creditor in the schedules and on the matrix in the corporate bankruptcy file, but was not listed as a creditor in the schedules or on the matrix in Fisher's individual file.<sup>1</sup> Although scheduled as a creditor in the corporate case, Kingsley did not file a proof of claim or otherwise participate in that case. An order confirming the plan of reorganization was entered in both cases on July 25, 1986, and the cases were subsequently closed in 1988.

On or about August 8, 1989, Kingsley filed a two-count petition in state court against Kingsley & Fisher Products, Inc. and Ronald Fisher, alleging that the company had failed to pay him monies owed under the terms of the Stock Purchase Agreement, and further alleging, in Count II, that Fisher was liable for the debts of the company on the basis of his personal guarantee. After obtaining an order reopening the bankruptcy cases, Kingsley & Fisher Products, Inc. and Ronald Fisher each filed a Petition for Injunctive Relief, requesting that the

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<sup>1</sup>The parties contend that Kingsley's name was initially listed on the matrix in Fisher's bankruptcy file and then crossed off. A review of the Court file, however, indicates that Kingsley was not listed, at any time, on the matrix filed in Fisher's individual case. While no explanation has been provided for omitting Kingsley's name from the list of creditors in Fisher's file, there also has not been any evidence of fraud or intent to deceive.

Bankruptcy Court enjoin the continuation of the state court action commenced by Kingsley. At the hearing on the petitions, counsel for Kingsley conceded that the claim against Kingsley & Fisher Products, Inc. is barred by the confirmed plan of reorganization. Kingsley contends, however, that his claim against Fisher individually is not barred by the confirmed plan and Fisher's subsequent discharge since he did not receive official notice of Fisher's bankruptcy.<sup>2</sup>

Section 1141(d) of the Bankruptcy Code provides as follows:

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan--

(A) discharges the debtor from any debt that arose before the date of such confirmation....

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

11 U.S.C. §1141(d)(1)(A) & (2). Section 523(a)(3) provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing

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<sup>2</sup>Fisher's plan of reorganization provides, in relevant part, "Class Sixteen creditors, holders of contingent claims on guarantees of debts of Kingsley & Fisher Products, Inc., shall be paid nothing under this Plan, no amounts being due thereon. (Second Amended Plan of Reorganization, ¶4.15).

of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing....

11 U.S.C. §523(a)(3)(A) (emphasis added).<sup>3</sup> Thus, under section 523(a)(3), "debts not listed or scheduled will be excepted from discharge unless the creditor had notice or actual knowledge of the bankruptcy case in time to allow for the timely filing of a claim or dischargeability complaint." In re Van Cloostere, 94 B.R. 131, 133 (Bankr. S.D. Ill. 1988). In order to satisfy due process requirements, the notice that is given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

There are numerous decisions holding that creditors who are not listed or scheduled, but who have notice or actual knowledge of a bankruptcy proceeding in time to protect their rights, are barred from later asserting an untimely claim against the debtor, or from filing an untimely complaint to determine dischargeability. For example, in In re Alton, 837 F.2d 457 (11th Cir. 1988), a creditor who was not listed in debtor's Chapter 11 schedules and who did not receive notice of the

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<sup>3</sup>At least one court has held that section 523(a)(3) applies only where the debtor is an individual debtor. See In re Spring Valley Farms, Inc., 863 F.2d 832, 834 (11th Cir. 1989). Kingsley has conceded that his claim against Kingsley & Fisher Products, Inc. is barred by the confirmed plan of reorganization. Thus, because the case at hand involves the application of section 523(a)(3) to an individual debtor only, the Court need not address the effect of this section on a corporate debtor.

bar date for filing complaints to determine dischargeability, but who did have notice of the bankruptcy case, filed an untimely request for extension of time to file an objection to dischargeability. The Court, recognizing the "harsh facts" of the case, nonetheless held that the creditor was barred from asserting any claim of nondischargeability against the debtor. As explained by the Eleventh Circuit:

The statutory language clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates. This furthers the bankruptcy policy of affording a "fresh start" to the debtor by preventing a creditor, who knew of a proceeding but who did not receive formal notification, from standing back, allowing the bankruptcy action to proceed without adjudication of his claim, and then asserting that the debt owed him is undischageable.

Id. at 460. See also Matter of Sam, 894 F.2d 778 (5th Cir. 1990); Matter of Compton, 891 F.2d 1180 (5th Cir. 1990); In re Silver, 107 B.R. 328 (Bankr. D.N.M. 1989); In re Rider, 89 B.R. 137 (Bankr. D.Colo. 1988). Following the decision in In re Alton, this Court has likewise held that "while due process requires that creditors be given notice so that they may protect their rights, creditors with actual notice of a bankruptcy proceeding must act to ascertain and meet the bar dates." In re Van Cloostere, 94 B.R. at 135.

Kingsley contends that the United States Supreme Court's decision in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 565 (1988) controls the question of what constitutes adequate notice in this case, and further asserts that based on the decision in Tulsa, he was entitled to "official notice" of

Fisher's bankruptcy proceeding. The Court disagrees.

Tulsa involved an Oklahoma probate law that required creditors to present their claims to the executor or executrix of an estate within two months of the publication of a notice advising creditors of the commencement of probate proceedings. The issue before the Court was whether notice by publication satisfies the Due Process Clause. The Court held that such notice was insufficient and that "a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted." Id. at 490, 108 S.Ct. at 1347. The Court does not believe that the holding in Tulsa can be construed to mean that Kingsley was entitled to "official notice" of Fisher's bankruptcy proceeding. To construe the Tulsa decision in that manner would render meaningless the provisions of section 523(a)(3) of the Bankruptcy Code.

In determining whether Kingsley is barred, under sections 1141(d) and 523(a)(3)(A) of the Bankruptcy Code, from pursuing his claim against Fisher, it is clear that Fisher has the burden of proving "notice or actual knowledge." Hill V. Smith, 260 U.S. 592, 594-95, 43 S.Ct. 219, 219-20, 67 L.Ed. 419 (1923) ; U.S. Small Business Admin. v. Bridges, 894 F.2d 108, 111 (5th Cir. 1990). Based on the evidence presented, as discussed below, the Court finds that Fisher has met his burden of proof.

Fisher testified that he spoke with Kingsley the day before he filed his bankruptcy petition, and informed Kingsley that he would be filing a bankruptcy proceeding and that he needed money for both the corporate filing and the individual filing. Fisher further testified

that Kingsley had two sons working for Fisher at the time the bankruptcy petitions were filed, and that on October 24, 1985, Fisher had a meeting with his employees to inform them that both he and the Company had filed bankruptcy proceedings. Although Fisher admitted that he could not be certain that this information was relayed to Kingsley, he also testified that he "had no doubt" that Kingsley knew of his personal bankruptcy.

Additionally, a Consent order between Kingsley & Fisher Products, Inc., Ronald Fisher and old National Bank of Centralia was executed and filed with the Bankruptcy Court on December 6, 1985. The caption on the Consent Order identified both Kingsley & Fisher Products, Inc. and Ronald Fisher as debtors and listed the corresponding bankruptcy case numbers. A copy of the Order was sent to all creditors in both cases. Since Kingsley was clearly listed as a creditor in the corporate bankruptcy, the Court can only conclude that he received a copy of this Consent Order, and that he was, at that time, notified of Fisher's personal bankruptcy.<sup>4</sup>

While any of these facts might not suffice, standing alone, to establish that Kingsley had notice or knowledge, the Court is convinced, based on the evidence as a whole, that Kingsley did have both notice and actual knowledge of Fisher's bankruptcy proceeding.

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<sup>4</sup>An Order Approving Amended Disclosure Statement was entered in Fisher's individual bankruptcy case on June 24, 1986. That order provided that proofs of claim were to be filed on or before three days prior to the date of the hearing on confirmation of the Second Amended Plan. Kingsley, who learned of Fisher's bankruptcy in the latter months of 1985, clearly had sufficient time to file a proof of claim in a timely manner.

Indeed, Kingsley has never denied that he had notice or knowledge of Fisher's bankruptcy case, but has instead claimed only that he was not placed on the matrix of creditors and that he did not receive "official notice." Moreover, Kingsley did not appear at the hearing on the Petitions for Injunctive Relief to testify and has offered no evidence to dispute the testimony of Fisher.<sup>5</sup>

Accordingly, IT IS ORDERED that the Petitions for Injunctive Relief are GRANTED. IT IS FURTHER ORDERED that Bertis Kingsley is enjoined from proceeding with the state court action against Kingsley & Fisher Products, Inc. and Ronald Dean Fisher, commenced on August 8, 1989, Case Number 89-L-75, in the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois.

\_\_\_\_\_/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: October 25, 1990

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<sup>5</sup>The Court again notes, with interest, that Kingsley did not file a proof of claim or otherwise participate in the corporate bankruptcy proceeding. Additionally, Kingsley waited three years from the date of confirmation to file the state court action against Kingsley & Fisher Products, Inc. and Ronald Fisher.